

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CIBAO MEAT PRODUCTS

AND

CASE 2-CA-32811

**LOCAL 169, UNION OF NEEDLE
TRADES, INDUSTRIAL AND
TEXTILE EMPLOYEES,
AFL-CIO**

Vonda Marshall, Esq., Counsel for
the General Counsel
Irene Thomas, Esq., Counsel for the
Respondent
Stuart Lichten, Esq., Counsel for the
Charging Party

SUPPLEMENTAL DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this backpay case in New York City on December 7, 2004 and February 23, 24, and 25, 2005.

This case is based on a Backpay Specification that was issued by the Regional Director of Region 2 on August 5, 2004. The Board's underlying decision is reported at 338 NLRB No. 134 (2003) and was enforced by the Second Circuit Court of Appeals on May 30, 2004.

The original Backpay Specification alleged that the Respondent owed certain amounts, (with interest), to three employees, Modesto Flores, Cayetano Flores and Jose Luis Mendez. However, during the hearing, a settlement was reached regarding the backpay for Modesto Flores and Cayetano Flores. I approved that settlement.

That leaves for disposition, the backpay of Jose Luis Mendez.

On December 14, 2004, the General Counsel amended the Specification based on documents such as payroll records that she obtained at the opening of the hearing. The amendments were as follows:

1. Based on an unconditional offer of reinstatement, the General Counsel alleged that the backpay period ran from January 18, 2000 to December 6, 2004.

2. The General Counsel alleged that the pre-discharge average weekly earnings for Jose Luis Mendez were \$435.05 and therefore that his weekly gross backpay from January 18, 2000 to March 18, 2001 would be \$435.05. Based on the collective bargaining agreement in effect during this period of time, the General Counsel argues that Mendez would have received

raises during 2001, 2002, 2003 and 2004 so that his weekly gross backpay for each period would be \$452.00, \$468.95, \$485.90 and \$505.62.

3. After the hearing opened, the General Counsel amended the Specification to substantially increase Mendez's interim earnings. However, she also amended the Specification to substantially increase his alleged interim expenses. The result was a somewhat larger net backpay claim and the total backpay claim here \$76,621.21 plus interest.

The Respondent's Counsel made a number of contentions. First, she contended that Mendez willfully concealed his interim earnings and therefore that he should be denied backpay. Secondly, she asserted that Mendez failed to mitigate his losses by failing to seek comparable employment during the backpay period.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

I. Findings and Conclusions

(a) Gross Backpay

The testimony of the Region's Compliance Officer was that she calculated the gross backpay based on an examination of the Company's payroll records which were produced at the opening of the hearing on December 7, 2004. In this regard, the Compliance Officer, relying in part on these records and the testimony of the Company's Vice President, Lutzi Vieluf Isidor determined that as of December 1999, Mendez received \$7.70 per hour and that the wage rate for this job would have been the same in 2000. The Compliance Officer determined that as of March 15, during each year from 2001 to 2003, Mendez, along with the other employees, would have received wage increases pursuant to the terms of a collective bargaining agreement.

Isidor testified that most employees tended to work an average of 10 to 12 hours of overtime per week during the backpay period. Based on this testimony the Compliance Officer assumed that Mendez would have worked an average of 11 hours overtime per week during the backpay period. Notwithstanding the Respondent's assertion that Mendez worked an average of 9.38 hours during the final quarter immediately prior to his discharge in 1999, the General Counsel's proposed formula seems to me to be a proper basis of determining the amount of overtime hours that Mendez would have worked during the backpay period had he not been illegally discharged.¹

(b) Interim Earnings and Interim Expenses

Mendez credibly testified that he started looking for employment about a week after his discharge in January 2000. In or about late February 2000, he obtained a job at a company called Art-Lore Inc. Unfortunately he was discharged after a few weeks. His testimony was that he had difficulty understanding instructions given to him by his bosses because of the inadequacy of his English. The evidence regarding his discharge by Art-Lore, as testified to by Mendez and by John Serravezza, did not demonstrate that this came about because of gross

¹ The General Counsel also points out that if one were to use the entire year of 1999 instead of the last quarter of that year, the records would show that Mendez averaged just about 11 hours of overtime per week.

misconduct on his part. Therefore, his discharge from employment at Art-Lore Inc. cannot constitute a failure to mitigate damages. *Ryder Systems*, 302 NLRB 608, 610 (1991).

In connection with his employment at Art-Lore, the evidence shows that he had gross interim earnings of \$765.00 and interim expenses, (transportation costs), of \$219.00. (Net plus of \$546.00).

Subsequent to his employment at Art-Lore, Mendez became a livery cab driver and entered into an arrangement with a company called Amsterdam Radio Dispatcher.² Without determining the legal status of his relationship, this arrangement was essentially that Mendez worked as an independent contractor who, for a monthly fee to Amsterdam, received dispatches via two way radio, to customers mainly in upper Manhattan and the Bronx. In doing this work, Mendez purchased his own Lincoln Town Car and purchased his own gasoline. He incurred other expenses such as the costs of obtaining a taxi license, the cost of annual drug tests and the costs of vehicle registration and safety inspections. Additionally, he incurred costs of certain vehicle equipment such as a two way radio and a glass partition. Apart from insurance, the other major expense, according to Mendez, was for gasoline. Although he estimated that gasoline cost about \$1.47 per gallon at the time, the General Counsel proffered information indicating that average prices of gasoline in downstate New York, in the fourth quarter of 2000, was about \$1.64 per gallon. (www.nyserda.org/Energy_Information/nyepa.asp.)³

During 2001 Mendez testified that his average gross income from his cab driving work was about \$60 per day. He testified that in 2002, his average gross income was about \$75 per day and that this increased to an average of about \$80 per day during 2003. For better or worse, Mendez could not produce any records that supported these estimates.

After driving the cab for a couple of years, Mendez gave that up and acquired another job at a company called Templar Associates. He worked a 40 hour week and was paid during 2003, at the rate of \$8.00 per hour. In 2003, his gross earnings from Templar were \$3,200.00. For the year 2004 until December 6, (when a valid reinstatement offer was made), Mendez's gross earnings from Templar were \$15,840.00. (He received a raise to \$8.25 per hour).

Many of his expenses associated with driving the cab were substantially documented either by receipts or were consistent with New York regulations. I therefore conclude that those expenses listed in the attached Appendix A were proven by the General Counsel. The real problem, in my opinion, was with Mendez's estimate of his expenditure for gasoline.

Mendez testified that although he occasionally made trips to the airports or to Brooklyn or Queens, the majority of his fares were local, confined to upper Manhattan and the Bronx. He testified that in the year 2000 he averaged about 12 to 14 fares per day. Assuming that his estimate of his average daily earnings is accurate, that would mean that his average fare would be \$5. And since the minimum fare at that time was \$5 for a trip of up to 20 blocks, (in New York about a mile), then it would be safe to assume that his fares were for trips that averaged about one mile each. (This would not account for tips and I think that it would be reasonable to assume that a typical tip would be about \$1 for a fare of \$5 or more). Taking into account, the

² This is different from a yellow cab because in New York, yellow cabs are allowed to cruise and pick up fares along the way. Typically, livery cab drivers get their fares from a dispatcher. That is not to say that livery cab drivers have not been known to pick up fares on the streets, especially in locations away from the central city.

³ The General Counsel did not include the cost of the car as part of his interim expenses.

fact that he would have to travel from the destination of fare one to get to the home of fare two, it would be reasonable to double the number of miles for each fare. Therefore assuming that each fare would involve a trip of 2 miles, a set of 13 fares per day would take about 26 miles. Adding another 8 miles for good luck would bring us up to about 34 miles per day.

The vehicle driven by Mr. Mendez was a 1995 Lincoln Town Car. That model, according to the US Dept. of Energy, gets 17 mpg in city driving. (Mendez testified that there was nothing wrong with the vehicle). See www.fueleconomy.gov. Thus, in this kind of vehicle, it would take two gallons of gas to go 34 miles in city driving. And if the average price of gasoline was \$1.66 per gallon, a reasonable estimate of his average daily cost of gasoline in 2000 would be \$3.32 or \$16.68 less than he claimed.⁴

Mr. Mendez testified that he spent a good deal of his time driving around while waiting for dispatched fares. This may be so, but the only reasonable explanation for this type of otherwise fuel inefficient behavior, would be to pick up undispached fares on the street. (Livery cabs are not legally allowed to pick up street fares).

There are, in my opinion, two possible scenarios. In the first, Mendez accurately reported the gross revenues that he derived from dispatched fares and grossly over-estimated his gasoline expenditures. The other scenario is that Mendez underestimated his gross revenues by not reporting undispached fares and accurately estimated his gasoline expenses.

I frankly don't know which of these scenarios correctly reflects Mendez's work situation during the time that he drove the livery cab. Nevertheless, giving him the benefit of the doubt, I shall conclude that he more or less accurately estimated his gross earnings but substantially underestimated his gasoline expenses during the same period of time. In fact, I think that it is more reasonable to calculate his average gasoline expenses at about 17% of his claimed amount.

Notwithstanding my conclusion that Mendez substantially underestimated his gasoline expenses, I am not willing to say that he willfully withheld information from the government in connection with the back pay investigation. It is one thing for me to conclude, based on a preponderance of the evidence standard, that Mendez did not accurately report his interim expenses. But it is quite another thing for me to conclude, particularly in the absence of any records, that I am certain that he deliberately misled the government in this regard.⁵

Nor am I persuaded that certain evidence regarding his tax returns and a mortgage application establishes that Mendez deliberately misled the government regarding his interim earnings or expenses. It is quite clear to me that Mendez, who does not speak or read English well, relied on a third person to fill out his tax returns. And based on his testimony, I doubt that he truly understood what was being done in this respect.⁶ Similarly, the application for a

⁴ The average price of gasoline was about \$1.55 per gallon in 2001. The average price was about \$1.46 per gallon in 2002. The average price was about \$1.71 in 2003. And the average price was about \$2.00 per gallon in 2004.

⁵ In *American Navigation Co.*, 2689 NLRB 426 (1983), the Board held that where "discriminates found to have willfully concealed from the Board their interim employment will be denied backpay for all quarter in which they engage in the employment so concealed."

⁶ In the present case, Mendez, from the outset of the backpay investigation, fully disclosed the sources of his interim earnings including those from Atlantic Radio Dispatcher Inc. The difficulty was that in the absence of records, he may have miscalculated his gross earnings and

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mortgage was dealt with through a New Jersey real estate broker who was interested in making a sale. To the extent that the application may have overstated his family income, I suspect that this was done through the broker in order to ensure that Mendez would be eligible for financing.

5 The Respondent contends that Mendez should be credited with interim earnings resulting from the profits derived from the sale of a property and the rents derived before its sale. This contention is based on the fact that Mendez and his wife, along with a friend, jointly purchased a house in New Jersey to be used as their personal residence. A portion of that property was also rented.

10 Mendez was never engaged in the business of buying, selling or renting real estate. The property in question was purchased to be used as his home and a portion was rented to a relative to defray the costs on servicing the mortgage and other expenses. It is true that Mendez managed to make a profit when he sold this house, but that transaction was
15 independent from and not related to his work. I therefore do not conclude that these property transactions constitute interim earnings and they cannot be used to reduce his backpay.

 Therefore, based on the record as a whole, I conclude that the amount of backpay owed to Mendez is \$62,782.07 plus interest.

20 On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended ⁷

ORDER

25 Cibao Meat Products, shall pay Jose Luis Mendez the sum of \$62,782.07 plus interest.

Dated: Washington, D.C.

Raymond P. Green
Administrative Law Judge

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interim expenses. (Indeed, it looks like his initial disclosure to the Compliance Officer was an estimate, not of his gross interim earnings and gross interim expenses but of his net interim earnings. This would be consistent with the way his Income tax return was filed). In any event, although the tax returns may be used in assessing his overall credibility, it is not the Board's function to do the Internal Revenue Service's job. *Atlantic Limousine Inc.*, 328 NLRB 257, 258 (1999).

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50 ⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix A
Interim expenses from driving a cab.

5	Q1 2000	Drug test	24
		Taxi license	120
		Fingerprinting	75
		Training Film	35
		Car registration	425.25
		Car Inspection	38
		Total	731.25
15	Q2 2000	NYC Taxi fee	550
		Glass Partition	450
		Two way radio 700	
		Fee to Amsterdam	315
		Gasoline	183
		Auto Insurance	1023.51
		Total	3221.51
25	Q3 2000	Amsterdam	455
		Gasoline	265
		Auto Insurance	1023.51
		Car Inspection	38
		Total	1781.51
30	Q4 2000	Amsterdam	455
		Gasoline	265
		Auto Insurance	1023.51
		Car Inspection	38
		Total	1781.51
35	Q1 2001	Drug test	24
		Car registration	425.25
		Amsterdam	455
		Gasoline	265
		Auto Insurance	1301.24
		Car Inspection	38
		Total	2508.49
45	Q2 2001	NYC taxi fee	550
		Amsterdam	455
		Gasoline	265
		Auto Insurance	1301.24
		Car Inspection	38
		Total	2609.24
50	Q3 2001	Amsterdam	455
		Gasoline	265
		Auto Insurance	1301.24
		Car Inspection	38
		Total	2959.24

5	Q4 2001	Amsterdam	455
		Gasoline	265
		Auto Insurance	1301.24
		Car Inspection	38
		Total	2959.24
10	Q1 2002	Drug test	24
		NYC taxi fee	550
		Amsterdam	455
		Gasoline	265
		Auto Insurance	2280
		Car Inspection	38
15	Q2 2002	Total	3612
		Amsterdam	455
		Gasoline	265
		Auto Insurance	2280
		Car Inspection	38
20	Q3 2002	Total	3038
		Amsterdam	455
		Gasoline	265
		Auto Insurance	2280
		Car Inspection	38
		Camera for taxi	650
25	Q4 2002	Total	3688
		Amsterdam	455
		Gasoline	265
		Auto Insurance	2280
		Car Inspection	38
30	Q1 2003	Car registration	425.25
		Total	3463.25
		Amsterdam	455
		Gasoline	265
		Auto Insurance	2280
		Car Inspection	38
35	Q2 2003	Total	3083
		Amsterdam	520
		Gasoline	221
		Auto Insurance	2280
		Car Inspection	38
40	Q3 2003	Total	2720.24
		Amsterdam	520
		Gasoline	221
		Auto Insurance	1941.24
		Car Inspection	38
		Total	2720.24
45	Q4 2003	Amsterdam	520
		Gasoline	221
		Auto Insurance	1941.24
		Car Inspection	38
		Total	2720.24
50	Q1 2004	Amsterdam	520
		Gasoline	221
		Auto Insurance	1941.24
		Car Inspection	38
		Total	2720.24

Appendix B

	Period	Weeks	Wkly pay	O/T	Gross	interim earnings	interim expenses	Total	Backpay
5	Q1 2000	11	308	127.05	4785.55	765	950.25	-185.25	4970.8
	Q2 2000	13	308	127.05	5655.65	3240	3221.51	18.49	5637.16
	Q3 2000	13	308	127.05	5655.65	4680	1781.51	2898.49	2757.16
	Q4 2000	13	308	127.05	5655.65	4680	1781.51	2898.49	2757.16
10	Q1 2001	11	308	127.05	4785.55	4950	2508.49	2441.51	2344.04
	Q1 2001	2	320	132	904	900	0	900	4
	Q2 2001	13	320	132	5876	6240	2609.24	3630.76	2245.24
	Q3 2001	13	320	132	5876	5850	2959.24	2890.76	2985.24
15	Q4 2001	13	320	132	5876	5850	2959.24	2890.76	2985.24
	Q1 2002	9	320	132	4068	4320	3612	708	3360
	Q1 2002	4	332	136.95	1875.8	1920	0	1920	0
	Q2 2002	13	332	136.95	6096.35	6240	2959.24	3280.76	2815.59
20	Q3 2002	13	332	136.95	6096.35	6240	2959.24	3280.76	2815.59
	Q4 2002	13	332	136.95	6096.35	6240	2959.24	3280.76	2815.59
	Q1 2003	9	332	136.95	4220.55	3825	3083	742	3478.55
	Q1 2003	4	344	141.9	1943.6	1700	0	1700	0
25	Q2 2003	13	344	141.9	6316.7	5525	2720.24	2804.76	3511.94
	Q3 2003	13	344	141.9	6316.7	3200	2720.24	479.76	5836.94
	Q4 2003	13	344	141.9	6316.7	2970	0	2970	3346.7
	Q1 2004	9	344	127.05	4239.45	2970	0	2970	1269.45
30	Q1 2004	4	358	147.62	2022.48	1320	0	1320	702.48
	Q2 2004	13	358	147.52	6571.76	4290	0	4290	2281.76
	Q3 2004	13	358	147.52	6571.76	4290	0	4290	2281.76
	Q4 2004	9	358	147.52	4549.68	2970	0	2970	1579.68
35									62782.07
40									
45									
50									